UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 92-3130

United States of America

v.

Blaine A'mmon White,

Appellant

PETITION FOR REHEARING

Blaine A'mmon White
Pro Se
3204 West Strathmore Avenue
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(410) 358-6443

August 10, 1993

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PETITION FOR REHEARING

Petitioner, Blaine A'mmon White, *pro se*, moves this Court pursuant to Fed. R. App. Rule 40 and local Rule 15, for a rehearing upon the following issues:

1. Petitioner's request for a special jury instruction which would have limited the scope and effect of the evidence of Appellant conduct in acquiring

and transferring a fraudulent birth certificate was denied by the district court.

This Court, in its opinion dated July 27, 1993, failed to address the "jury instruction" argument advanced by petitioner. In light of the substantial effect that this Court's ruling would have upon the outcome of petitioner's case, the "jury instruction" issue is meritorious and requires that this Court render a definitive decision upon the same.

2. Additionally, this Court, in a footnote, in its July 27, 1993 decision, opined that it would not revisit appellant's "collateral estoppel" argument. Appellant urges, law of the case notwithstanding, that a manifest justice would otherwise occur if the collateral estoppel issue is not revisited. Furthermore, with all due

respect, the basis of this Court's decision is erroneous. Therefore, petitioner is also entitled to a rehearing upon the "collateral estoppel" issue.

3. Following this petition is a Memorandum of Points and Authorities in Support of this Petition for Rehearing, which is incorporated herein and made a part of this petition which Appellant urges this Court to respectfully consider.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

FAILURE TO RULE UPON REQUESTED SPECIAL JURY INSTRUCTION

Appellant requested, of the district court, a special jury instruction limiting the scope and effect of evidence concerning the Appellant's behavior with respect to the acquisition, possession, and transfer of a birth certificate in the

name of William

Smith Baldwin to Harold Linden. The text of Appellant's requested jury instruction is Exhibit 2 of Appellant's exhibits in the above referenced matter. The district court denied Appellant's special jury instruction request. (Tr. Vol. 3A pp. 3A-2-3-A-4). The requested special jury instruction was lifted, almost verbatim, from Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed. 2d 708 (1990). The rationale for Appellant's special jury instruction was that evidence of other crimes and wrongs or acts under Fed. R. Ev. Rule 404(b) can only be introduced to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident..."

In the case at bar, it was the alleged intent of the government to

introduce the said acts of Appellant with respect to the Baldwin birth certificate as foundation for the prosecution of Appellant upon the passport fraud and aiding and abetting counts of the second indictment lodged against Appellant. (Tr. Vol. 1A, pp. 1A-2-1A-27). Despite the aforesaid assertion on the part of the government, it was the government's intention that an inference of guilt be formed by the jury as a result of the birth certificate evidence. (Tr. Vol. 3A, pp. 3A-2-3). In light of the fact the Appellant was acquitted of criminal wrongdoing with respect to the acquisition and transfer of the Baldwin birth certificate, the district court should have permitted Appellant's special jury instruction.

The efficacy of petitioner's special jury instruction request is made even more

poignant when one considers the statement of government counsel during his jury summation. There, the government argued that because the name "Norman Monroe" appeared on both the application for the Baldwin birth certificate and the wire transfer of funds to Linden, that Appellant knew of Linden's aliases. (Tr. #A-30; lines 7-25 and 3A-31; lines 1-17). Therefore, even if one were to assume, for the sake of argument, that the birth certificate had been only foundational up to this point at trial; the logical inference of guilt drawn from the aforesaid, transformed the birth certificate evidence into a bad act which made the limiting jury instruction a legal necessity. In light of the aforegoing, the failure of the district court to grant the requested special jury instruction is not harmless error. The jury instruction

had a direct bearing upon the outcome of the case, and could have meant the difference between an acquittal and a conviction.

The necessity of a definitive ruling upon the issue of a requested special jury instruction is heightened in light of the reversal of Grady v. Corbin, 495 U.S. 508 (1990). The case at bar is the first to come to this Court subsequent to the said reversal. Appellant is thus entitled to a rehearing on the jury instruction issue.

Appellant, in both his principal brief and his reply brief argued before this Court the legitimacy of the special jury request. Nevertheless, this Court, in its opinion rendered July 27, 1993, did not address the "jury instruction" issue. Therefore, Appellant asserts that he is entitled to a rehearing upon the issue of

the jury request and petitions this Court for the same.

ADHERENCE TO LAW OF THE CASE WILL WORK A GRAVE INJUSTICE AGAINST

APPELLANT

Appellant requested that this Court revisit its ruling with respect to the collateral estoppel issue raised in United States v. White, 936 F.2d 1326 (D.C.Cir. 1991). This Court, citing Lever Brothers Co. v. United States, 981 F.2d 1330 (D.C.Cir. 1993), decided to adhere to law of the case, and not disturb the initial ruling with respect to the collateral estoppel issue.

Appellant petitions this Court for a rehearing in that, with all due respect, the ruling of the Court with respect to this collateral estoppel issue is erroneous. Undisturbed, the said ruling will work a grave injustice upon Appellant.

Ashe v. Swenson, 937 U.S. 436, 90

S.Ct. 1189, 25 L.Ed.2d 469 (1970) requires reviewing Courts to examine the entire record of the prior proceeding, including pleadings, evidence, charge and jury instructions to conclude whether a "rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration."

In the case at bar, this Court, in United States v. White, infra, citing United States v. Scott, 464 F.2d 832, 833 (D.C.Cir. 1972), simply relied upon the fact of the jury's failure to reach a conclusion as to the other charges of the initial indictment in rejecting Appellant's collateral estoppel argument. Under Ashe, supra, the aforesaid rational nullifies the effect of the rule. A hung jury is, by definition, one which is inconclusive. Therefore, it is erroneous

to draw an issue preclusion analysis from the fact of the hung jury alone; as was done by both the district court and the panel which heard Appellant's interlocutory appeal. This Court's attention is drawn to United States v. Bailin, 997 F.2d 270, 279 (7th Cir. 1992). In Bailin, id., the government argued, and that court rejected, the very rationale which was relied upon in the case at bar with respect to the acquittal on one count coupled with a hung jury in a related count. The court, in Bailin, Id., stated that the government cannot prevail with the ... argument that an acquittal on one count coupled with a hung jury on a related count makes it impossible to determine that a jury necessarily established any common element of [the] two defenses against the government. Therefore, at the very minimum, reliance

upon the hung jury on related counts is erroneous. This Court should, at least, make the analysis as required in Ashe, infra, before rejecting Appellant's collateral estoppel argument.

Moreover, the court in Ashe, infra, stated with precision the elements which reviewing courts are to take into account when performing a collateral estoppel analysis; nowhere contained therein is there any directive to include the fact of a hung jury as part of the equation. In fact, only the first circuit in United States v. Aquilar-Aranceta, 957 F.2d 18 (1st Cir. 1992) follows the rationale of the case at bar. All other courts which have taken up the collateral estoppel issue in the context of the case at bar cite rationale similar to that in Bailin, infra. See United States v. Brown, 983 F.2d 201, 202 (11th Cir. 1993), United

States v. Seley, 957 F.2d 717, 721-723 (9th Cir. 1992), and Pettaway v. Plummer, 943 F.2d 1041, 1047 (9th Cir. 1991).

When, as in the case at bar, a criminal defendant has been acquitted for an offense in one proceeding, the law "attaches particular significance to an acquittal", so that the acquittal, "however mistaken [it] may have been" bars retrial for the same offense ... United States v. Scott, 437 U.S. 82, 89, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978). Inconsistent verdicts are thus the price of jurors' inexperience, unanimity, and prerogative. United States v. Bailin, infra.

Therefore, Appellant requests a rehearing upon the issue of collateral estoppel.

CONCLUSION

For the reasons stated above,

Appellant requests a hearing upon the issue of the requested special jury instruction as there was no ruling made by this Court with respect to the same. Additionally, Appellant requests a rehearing upon the collateral estoppel rationale. This Court's ruling, with all due respect, was erroneous, and adherence to the law of the case will work a grave injustice.

Respectfully submitted,

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3204 West Strathmore Avenue
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(410) 358-6443

CERTIFICATE OF SERVICE

I, the undersigned, this 10th day of August, 1993, hereby certify that a true and complete copy of aforegoing Petition for Rehearing and attached Memorandum of Points and Authorities was mailed, first class, postage pre-paid to Valinda Jones, Assistant United States Attorney, and John R. Fisher, Assistant United States Attorney, 555 Fourth Street, N.W., Room 4229, Washington, D.C., 20001.

_____

Blaine A'mmon White

APPENDIX I

UNITED STATES COURT OF APPEALS

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SUGGESTION FOR REHEARING EN BANC

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SUGGESTION FOR REHEARING EN BANC

Concise Statement of Issue and Its Importance

1. On July 28, 1993, the Supreme Court decided United States v. Dixon, 61 U.S.L.W. 4835. The aforesaid decision reversed Grady v. Corbin, 495 U.S. 508 (1990).

The case at bar represents the first

instance, since Dixon, supra, where this Court is asked to determine whether a defendant is entitled to a special jury instruction when the government is allowed to introduce evidence of prior criminal conduct for which the said defendant was acquitted, when that same conduct forms the bases for a successive prosecution of that defendant upon a subsequent indictment.

2. The decision of this Court in United States v. White, 936 F.2d 1326 (D.C.Cir. 1991), and in the case at bar, with all due respect, are in direct conflict with Ashe v. Swenson, 431 U.S. 651 (1977), United States v. Brown, 983 F.2d 201 (11th Cir 1993), United States v. Bailin, 977 F.2d 270 (7th Cir. 1992), United States v. Seley, 957 F.2d 717 (9th Cir. 1992), and Petaway v. Plummer, 943 F,2d 1041 (9th Cir. 1991).

Specifically, this Court's decision in United States v. White, supra, relies upon the verdict of an acquittal coupled with a hung jury to determine that collateral estoppel does not apply. The aforesaid holding based upon such rationale nullifies the rule of Ashe, supra, and its prodigy.

Appellant has filed a Petition for Rehearing which is appended hereto and made a part of this Suggestion for Rehearing En Banc; the Court is asked to consider the former as rationale for this suggestion.

Respectfully submitted,

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Pro Se
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CERTIFICATE OF SERVICE

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Blaine A'mmon White

APPENDIX J

JURY INSTRUCTION REQUESTED BY PETITIONER AND GIVEN AT FIRST TRIAL

[IIIB-46] The birth certificate in this case is alleged to be the identification document. The parties agree the defendant actually possessed the birth certificate.

2, that the defendant intended to use the document to defraud the United States; and

3, that the defendant acted wilfully.

Now, Ladies and Gentlemen, you're advised that the element of knowledge may be satisfied by an inference or inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's

knowledge of a fact may be inferred from the wilful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of wilfulness or knowledge.

In this connection, you are further instructed that if you find that the application for the duplicate birth record and the affidavit identifying Harold Linden as William Smith Baldwin which the defendant, Mr. White, filed to assist in the issuance of the passport were not completed for a legitimate legal purpose by an attorney during the usual course of his professional practice, and under the facts and circumstances known to him he

had every reason to believe that such documents had not been issued for a legitimate legal purpose, and the defendant deliberately and consciously closed his eyes to what he had every reason to believe was fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in this case, that the defendant knew such purported documents had not been issued for a legitimate legal purpose and hence were knowingly completed by him.